United Nations A/CN.9/798

General Assembly

Distr.: General
8 January 2014

Original: English

United Nations Commission on International Trade Law
Forty-seventh session
New York, 7-25 July 2014

Report of Working Group V (Insolvency Law) on the work of its forty-fourth session (Vienna, 16-20 December 2013)

Contents

		Paragraphs	Page
I.	Introduction	1-6	2
II.	Organization of the session	7-14	3
III.	Deliberations and decisions	15	4
IV.	Working Group V's current mandate	16-23	5
	A. Facilitating the cross-border insolvency of multinational enterprise groups	16-17	5
	B. Convention on selected international insolvency issues	18-19	6
	C. Insolvency of large and complex financial institutions	20-22	7
	D. Obligations of directors of enterprise group companies in the period approaching insolvency	23	7
V.	Topics for possible future work	24-30	8
	A. Choice of law	24	8
	B. Issues relating to creditors and claims	25	8
	C. Insolvency treatment of financial contracts and netting	26	8
	D. Regulation of insolvency practitioners	27	9
	E. Enforcement of insolvency-derived judgements	28	9
	F. Treatment of intellectual property contracts in cross-border insolvency cases	29	9
	G. Priorities for future work	30	10

V.14-00148 (E) 210114 220114

Please recycle

I. Introduction

(a) Centre of main interests and directors' obligations

1. At its forty-sixth session in 2013, the Commission finalized and adopted[1] two texts on insolvency law: (a) the revised Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency (set forth in A/CN.9/WG.V/WP.112, and revised by the Working Group at its forty-third session (A/CN.9/766) and by the Commission (A/68/17, para. 197)); and (b) part four of the Legislative Guide on Insolvency Law addressing the obligations of directors in the period approaching insolvency (set forth in A/CN.9/WG.V/WP.113, and revised by the Working Group at its forty-third session (A/CN.9/766) and by the Commission (A/68/17, para. 202)).

2. Those two texts were developed pursuant to a mandate[2] given to Working Group V in 2010 to initiate work on two insolvency topics: (a) providing guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) relating to centre of main interests (COMI) and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention; and (b) addressing the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases.

3. In recommending those two texts to the Commission for adoption, Working Group V noted that it had not yet completed its work on implementing the mandate received from the Commission and that there were pending issues to be addressed before the mandate was exhausted, specifically the concept of centre of main interests as it related to facilitating the conduct of cross-border insolvency proceedings concerning enterprise groups,[3] and directors' obligations in the context of enterprise groups,[4] together with that part of the mandate relating to the possible development of a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.[5]

4. At its forty-sixth session, after adopting the two texts noted above, the Commission decided that Working Group V should hold a colloquium in the first few days of the working group session scheduled for the second half of 2013 to clarify how it would proceed with the enterprise group issues and other parts of its current mandate and to consider topics for possible future work, including insolvency issues specific to micro, small and medium enterprises (MSMEs). The conclusions of that colloquium would not be determinative, but should be considered and evaluated by the Working Group in the remaining days of that

---

[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 198 and 204.

[2] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259.

[3] A/CN.9/766, paras. 103 and 105-107.

[4] Ibid., paras. 104 and 105-107.

[5] Ibid., paras. 105-107.

session, in the context of the existing mandate. Topics identified for possible future work should be reported to the Commission in 2014.[6]

(b) Insolvency of large and complex financial institutions

5. At its forty-third session (2010), the Commission agreed that the study proposed by Switzerland on the insolvency of large and complex financial institutions (see A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, particularly para. 7) should be undertaken by the Secretariat as resources permitted. It was noted in that regard that reports on work being undertaken by a number of other organizations on the same topic were expected by the end of 2010 and that those reports should be factored into the Secretariat's work. It was anticipated that coordination would be sought between the Secretariat and other interested international organizations.[7]

6. The Working Group first considered this topic at its forty-second session on the basis of a note prepared by the Secretariat (A/CN.9/WG.V/WP.109), reporting on the activities being undertaken by other organizations. The deliberations and conclusions of the Working Group on this topic are included in the report of that session (A/CN.9/763, paras. 95-96).

II. Organization of the session

7. The first three days of the session (16-18 December) were devoted to the colloquium noted above in paragraph 4, which considered issues relating to remaining elements of the existing mandate, topics for possible future work and issues already mandated for future work. Following the colloquium, the Working Group convened on 19 and 20 December.

8. Working Group V, which was composed of all States members of the Commission, held its forty-fourth session in Vienna from 16-20 December 2013. The session was attended by representatives of the following States Members of the Working Group: Austria, Belarus, Brazil, Canada, China, Colombia, Croatia, Denmark, El Salvador, France, Germany, Greece, Indonesia, Iran (Islamic Republic of), Italy, Japan, Mexico, Pakistan, Paraguay, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

9. The session was attended by observers from the following States: Belgium, Bolivia (Plurinational State of), Chile, Cyprus, Czech Republic, Dominican Republic, Iraq, Lithuania, Poland, Qatar, Romania, Slovenia and United Arab Emirates.

10. The session was attended by observers from the European Union.

---

[6] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 325.

[7] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 260.

11. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund and World Bank;

(b) *Invited inter-governmental organizations*: Inter-Parliamentary Assembly of the Eurasian Economic Community;

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Students Association (ELSA), INSOL International (INSOL), International Bar Association (IBA), International Insolvency Institute (III), International Swap and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), Union Internationale des Avocates (UIA) and Union Internationale des Huissiers de Justice et Officier Judiciaires (UIHJ).

12. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Ms. Jasnica Garašić (Croatia)

13. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.116);

(b) A note by the Secretariat outlining a summary of the previous discussions with respect to the remaining elements of its existing mandate, as well as proposals for possible future work (A/CN.9/WG.V/WP.117);

(c) A note by the Secretariat on recent developments with respect to the insolvency of large and complex financial institutions (A/CN.9/WG.V/WP.118).

14. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) remaining elements of the current mandate of Working Group V; (b) topics for possible future work; and (c) mandated future work.
5. Other business.
7. Adoption of the report.

III. Deliberations and decisions

15. The Working Group engaged in discussions on: (a) cross-border insolvency of multi-national enterprise groups; (b) the proposal for a convention or model law on selected international insolvency issues, including choice of law; (c) insolvency of large and complex financial institutions; (d) obligations of directors of enterprise

group of companies in the period approaching insolvency; (e) issues relating to creditors and claims; (f) the insolvency treatment of financial contracts; (g) regulation of insolvency practitioners; (h) the enforcement of insolvency-derived judgements; (i) insolvency treatment of intellectual property; and (j) expedited proceedings, including pre-packs and other mechanisms suitable for the insolvency of MSMEs on the basis of documents A/CN.9/WG.V/WP.117, and A/CN.9/WG.V/WP.118 as well as the presentations made at the colloquium. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Working Group V's current mandate

A. Facilitating the cross-border insolvency of multinational enterprise groups

16. The Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups by developing provisions on the following issues, a number of which would extend the existing provisions of the Model Law on Cross-Border Insolvency and part three of the Legislative Guide. and involve reference to the Practice Guide on Cross-Border Insolvency Cooperation:

(a) Provision of access to foreign courts for foreign representatives and creditors of insolvency proceedings involving enterprise group members;

(b) Recognition of foreign proceedings and foreign representatives (as between different proceedings concerning different group members), including recognition of foreign proceedings commenced against several group members at the same court;

(c) Distinctions between main and non-main insolvency proceedings might not be useful in group enterprise insolvencies;

(d) Recognition of one foreign proceeding as the coordinating proceeding, in appropriate circumstances;

(e) Identification of the "parent" and/or "primary group members" of an enterprise group that might adopt the role of, for example, facilitating development of a reorganization (or liquidation) plan, coordinating continuation or replacement of existing finance, and retaining professionals;

(f) Provision of "standing" for all group members in any insolvency proceeding applied for by a member of the enterprise group;

(g) Joint appointment of insolvency representatives to insolvency proceedings concerning different group members;

(h) Consideration of group members voluntarily joining the insolvency proceeding of the parent group member and agreeing to subject themselves to the jurisdiction of that proceeding;

(i) Use of "synthetic proceedings" (where creditors are treated in the main proceeding as if a non-main proceeding had opened) to reduce cost and expense;

(j) Joint financing among members of the enterprise group addressing issues of collateralization, supplier credit, guarantees, obligations and validation of collateral granted and priority for funds advanced;

(k) Authorization of contact and coordination between the courts and between the insolvency representatives (including foreign representatives or other members designated by a group) across enterprise group members subject to insolvency proceedings;

(l) Use of protocols to clearly define procedures and roles;

(m) Provision for joint/coordinated disclosure statements and plans of reorganization;

(n) Affirmation of the corporate identity and independence of group members;

(o) Provision of relief by a recognizing court to the foreign representative(s) presiding over the proceedings of several group members commenced in the same forum; and

(p) Provision of relief by a recognizing court to the foreign representative(s) presiding over the coordinating proceeding.

17. Having considered the form those provisions might take, the Working Group decided that their precise form could be decided as the work progressed. Those provisions might, for example, be a set of model provisions or a supplement to the existing Model Law.

B. Convention on selected international insolvency issues

18. Support was expressed in favour of the development of a convention as described in the proposal in paragraphs 7 to 16 of A/CN.9/WG.V/WP.117. This view was based on the need for binding norms to facilitate execution of insolvency decisions, to coordinate many aspects of cross-border insolvencies, particularly in the group context, and to deal with concerns arising in the view of some States that application of the Model Law should be reciprocal. However, a number of reservations about the feasibility of negotiating a convention were expressed, including whether there would be sufficient support from States for such an instrument, the competence of member States in regional economic integration organizations to participate in the negotiations, the time required for such negotiations, and the benefits of a convention over the existing Model Law. With respect to the latter point, the question was raised as to why the Model Law had not been more widely adopted. It was observed that many States were focused on reforming their domestic insolvency laws and asking them to consider cross-border insolvency law at the same time would be unrealistic. It was noted that adoption of the Model Law was part of a broader insolvency law reform program and that several more States were expected to enact the Model Law by the end of 2014.

19. Following expressions of support from a number of delegations, the Working Group agreed that it might be appropriate to study the feasibility of developing a convention, including gathering information on the issues facing States with respect to adoption of the Model Law. That study might be conducted informally by an ad

hoc group of interested delegations that could provide information to the Working Group for further discussion. The Secretariat was requested to facilitate such efforts on the part of interested delegations.

C. Insolvency of large and complex financial institutions

20. In view of developments subsequent to the inclusion of the proposal on cross-border insolvency of financial institutions in paragraphs 17 to 22 of document A/CN.9/WG.V/WP.117, the Working Group was provided with information modifying and clarifying the original proposal. Based on this additional information, the Working Group noted that in October 2013, the Financial Stability Board (FSB) had established a working group of legal experts with the mandate to address certain gaps in the implementation of Key Attribute 7.5 and ensure that countries developed expedited processes to give effect to foreign resolution actions and to present its preliminary conclusions and recommendations in autumn 2014. The Working Group noted that coordinating the work of organizations active in the field of international trade law, both within and outside the United Nations system, is an increasingly important task of UNCITRAL and that that task should be aimed at encouraging cooperation, at avoiding duplication of effort and promoting efficiency, consistency and coherence in the modernization and harmonization of international trade law.

21. On that basis, the Working Group agreed to continue with its current mandate referring to cross-border insolvency of financial institutions by:

(a) Welcoming the initiative of the FSB to establish a group of legal experts with the mandate to develop Key Attribute 7.5 regarding the recognition of foreign resolution actions and cross-border cooperation, and acknowledging the leading role of the FSB expert group in the development of this Key Attribute;

(b) Expressing its willingness and availability to share its know-how and legislative expertise with the FSB and its legal expert group, be it through support by the UNCITRAL secretariat, by participating in joint expert meetings or by any other means that the involved bodies may deem appropriate; and

(c) Expressing its intention to, as the FSB's legal expert group work progresses, consider its preliminary conclusions and recommendations and to report back to the Commission at a future session on what work by UNCITRAL might be desirable and feasible in the field of effective resolution regimes for financial institutions.

22. Ultimately, the Working Group encouraged the Secretariat to continue with its current mandate to monitor developments in this field, namely regulatory developments within supranational bodies or in selected national legislation.

D. Obligations of directors of enterprise group companies in the period approaching insolvency

23. The Working Group agreed on the importance of this topic given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the

Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group whose task would be to examine how part four of the Legislative Guide could be applied in the enterprise group context and any additional issues (such as conflicts between a director's duty to its own company and the interests of the group and issues of governing law) that might need to be addressed. The informal expert group would report back to the Working Group no later than the session in the second half of 2014.

V. Topics for possible future work

A. Choice of law

24. The Working Group noted that choice of law issues formed part of the proposal for a convention (as discussed above), and that some of the elements to be addressed in the context of further work on enterprise groups (such as synthetic secondary proceedings and directors' obligations) raised choice of law questions that would need to be addressed in the course of that work. However, paragraphs 12 to 16 of document A/CN.9/WG.V/WP.117 outlined a proposal for articulating principles on choice of law that could constitute possible future work. The Working Group expressed support for that proposal, noting that choice of law issues were key to many of the topics discussed in document A/CN.9/WG.V/WP.117.

B. Issues relating to creditors and claims

25. The Working Group agreed on the importance of a number of the issues raised under this heading (paragraphs 26 to 34, A/CN.9/WG.V/WP.117) and noted that several of them were likely to be addressed in the context of facilitating reorganization of enterprise groups, for example, access to information and creditor participation. The Working Group also noted that some of the issues could be addressed at a procedural level, but could raise significant difficulties if approached from a substantive perspective, for example, procedures for making claims as opposed to quantification of claims. Although there was support for undertaking work on some of these issues, it was felt that they were not a priority at this stage in view of the other topics being proposed.

C. Insolvency treatment of financial contracts and netting

26. In considering paragraphs 35 to 38 of document A/CN.9/WG.V/WP.117, it was observed that the development of the Unidroit Principles on Close-Out Netting had led to there being some inconsistency with recommendations 101 to 107 of the Legislative Guide on Insolvency Law and some concern was raised that the Legislative Guide no longer reflected best practice. One view was that in order to avoid reopening issues that had been carefully resolved in the Principles, no further

work on the Legislative Guide was required. Related views were that the Legislative Guide should refer to the Principles or that that chapter of the Legislative Guide should be deleted. A different view was that if the Guide no longer reflected best practice, it needed to be addressed by the Working Group and that any concern about duplication should be allayed by the fact that the Principles focus on close-out netting, while the Legislative Guide deals with a broader range of issues. There was general agreement that any work revising the Guide should ensure that there was no contradiction with the Principles or with other work being carried out on related issues by organizations such as the FSB and should take into account the different treatment in insolvency of banks and financial institutions on the one hand and non-bank and non-financial institutions on the other. The prevailing view was that future work on this topic should be undertaken.

D. Regulation of insolvency practitioners

27. While support was expressed in favour of the proposal contained in paragraphs 39 to 41 of A/CN.9/WG.V/WP.117, the Working Group was of the view that that work might best be developed informally in cooperation with relevant professional bodies such as the International Association of Insolvency Regulators (IAIR) with a view to possible consideration by the Working Group at a later date.

E. Enforcement of insolvency-derived judgements

28. Notwithstanding that the case in question, as noted in paragraph 42 of document A/CN.9/WG.V/WP.117, was an English case, the Working Group was of the view that it brought to light problems of a global nature. Strong support was therefore expressed in favour of the topic outlined in paragraphs 42 to 43 of that document. The Working Group noted that the Model Law did not provide an explicit solution for recognition and enforcement of insolvency-derived judgements, which had led to significant uncertainty and could have a chilling effect on further adoptions of the Model Law. Accordingly, it was an opportune time to address recognition and enforcement of these types of judgements, possibly by way of a supplement to the Model Law. A proposal to add recognition of discharge orders was also supported.

F. Treatment of intellectual property contracts in cross-border insolvency cases

29. The Working Group expressed interest in the proposal set forth in paragraphs 44 to 49 of document A/CN.9/WG.V/WP.117. Noting that it had already been addressed in the Intellectual Property Supplement to the Secured Transactions Guide, it was suggested that it might be appropriate to consider the issue as a supplement to the Legislative Guide on Insolvency Law.

G. Priorities for future work

30. The Working Group agreed that there remained significant areas for possible future work in the field of insolvency law. Having considered the priority in which work on the topics above might be undertaken, the Working Group was strongly of the view that at an appropriate time it should seek a mandate from the Commission to commence work on recognition and enforcement of insolvency-derived judgements. The Working Group was also of the view that choice of law, review of the Legislative Guide chapter on insolvency treatment of financial contracts and netting, and the treatment of intellectual property contracts in cross-border insolvency cases were important issues that warranted consideration, and should be retained in that order as candidates for possible future work.

United Nations A/CN.9/799

General Assembly

Distr.: General
13 February 2014

Original: English

United Nations Commission on International Trade Law
Forty-seventh session
New York, 7-25 July 2014

Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session (New York, 3-7 February 2014)

Contents

		Paragraphs	Page
I.	Introduction	1-4	3
II.	Organization of the session	5-11	4
III.	Deliberations and decisions	12-13	5
IV.	Preparation of a convention on transparency in treaty-based investor-State arbitration	14-146	5
	A. Consideration of the draft text of the convention	15-80	6
	1. Preamble	16-20	6
	2. Draft Article 1 — Scope of application	21-26	6
	3. Draft article 2 — Interpretation	27-28	7
	4. Draft article 3 — Application of the UNCITRAL Rules on Transparency	29-47	8
	5. Draft article 4 — Declaration on future [investment] treaties	48-50	10
	6. Draft article 5 — Reservations	51-55	11
	7. Draft article 6 — Declarations and reservations	56-69	12
	8. Draft article 7 — Depositary	70	14
	9. Draft article 8 — Signature, ratification, acceptance, approval, accession	71	14

V.14-00928 (E) 240214 250214

Please recycle

10. Draft article 9 — Effect in territorial units 72-73 14
11. Draft article 10 — Participation by regional economic integration organizations 74 14
12. Draft article 11 — Entry into force 75 14
13. Draft article 12 — Time of application 76-77 14
14. Draft article 13 — Revision and amendment 78 15
15. Draft article 14 — Denunciation of this Convention 79-80 15

B. Consideration of remaining open issues 81-133 15
1. Article 1(2) 82 15
2. Article 4 ..... 83-87 15
3. Article 3, paragraph (3) 88-96 16
4. Articles 3 and 5 ..... 97-128 17
5. Article 10(1) 129-133 22

C. Comments in relation to treaty practices 134-146 22
1. Article 6(6) 136 23
2. Article 8(1) 137 23
3. Article 13 ..... 138-146 23

V. Organization of future work 147 25

VI. Other business 148 25

I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)[1] that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.[2]

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of treaties already concluded.[3]

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission adopted[4] the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[5] ("Rules on Transparency") and the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).[6] The decision of the Commission adopting the Rules on Transparency included the recommendation that, "subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties."[7] At that session, the Commission agreed by consensus to entrust the Working Group with the task of preparing a convention ("transparency convention" or "convention") on the application of the Rules on Transparency to existing treaties, taking into account that the aim of the convention was to give those States that wished to make the Rules on Transparency applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.[8]

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.180, paragraphs 5-8.

---

[1] *Official records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.
[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.
[3] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.
[4] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 128.
[5] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex I.
[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex II.
[7] Ibid., para. 116.
[8] Ibid., para. 128.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its sixtieth session in New York, from 3-7 February 2014. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Mauritius, Mexico, Nigeria, Pakistan, Panama, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zambia.

6. The session was attended by observers from the following States: Angola, Burkina Faso, Chile, Cuba, Czech Republic, Egypt, Finland, Guatemala, Holy See, Libya, Madagascar, Netherlands, Nicaragua, Norway, Palestine, Peru, Poland, Qatar, Romania, Slovakia, Sweden, and Viet Nam.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Educational, Scientific and Cultural Organization (UNESCO);

(b) *Intergovernmental organizations*: African Union (AU), Cooperation Council for the Arab States of the Gulf (GCC), Organization for Economic Cooperation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association Suisse de l'Arbitrage (ASA), Asociacion Americana de Derecho Internacional Privado (ASADIP), Association of the Bar of the City of New York (ABCNY), Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), German Institution of Arbitration (DIS), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), International Bar Association (IBA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Miami International Arbitration Society (MIAS), Milan Club of Arbitrators, New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation, Pakistan Business Council (PBC), Queen Mary University of London (QMUL), Swedish Arbitration Association (SAA) and Tehran Regional Arbitration Centre (TRAC).

9. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. Yeghishe Kirakosyan (Armenia)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.180); (b) note by the Secretariat regarding the preparation of a convention on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.181).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a convention on transparency in treaty-based investor-State arbitration.
5. Organization of future work.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

12. The Working Group resumed its work on agenda item 4 on the basis of the note prepared by the Secretariat (A/CN.9/WG.II/WP.181). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Working Group considered agenda items 5 and 6. The deliberations and decisions of the Working Group with respect to those items are reflected in chapters V and VI, respectively.

13. At the closing of its deliberations, the Working Group requested the Secretariat (i) to prepare a draft transparency convention based on the deliberations and decisions of the Working Group, and in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the convention; and (ii) to circulate the draft transparency convention to Governments for their comments, with a view to consideration of the convention by the Commission at its forty-seventh session, to be held in New York from 7-25 July 2014.

IV. Preparation of a convention on transparency in treaty-based investor-State arbitration

14. The Working Group recalled its discussions at its fifty-ninth session (Vienna, 16-20 September 2013) at which time it completed the first reading of the transparency convention.

A. Consideration of the draft text of the convention

15. The Working Group proceeded to consider the draft text of the convention as set out in paragraph 7 of document A/CN.9/WG.II/WP.181.

1. Preamble

16. As a preliminary matter, the Working Group recalled its decision at its fifty-ninth session that the mandate given by the Commission to the Working Group (see above, para. 3) would not be included in the preamble of the transparency convention, but rather that language contained in paragraph 6 of document A/CN.9/WG.II/WP.181 would be included for consideration by the Commission in the proposal for the General Assembly resolution recommending the transparency convention (see A/CN.9/794, para. 41).

17. In order to emphasize the understanding that Parties to the transparency convention should have the flexibility to adopt the declarations and reservations under the convention, a proposal was made to add the following language to the preamble: "Acknowledging the importance of a flexible approach under the terms of this Convention in light of the complexity of bilateral investment treaties and the interests of State Parties to such treaties, and emphasizing that the Convention constitutes a cornerstone to strengthening the global impact of investor-State dispute mechanism;". That proposal did not receive support.

18. The Working Group recalled that, at its fifty-ninth session, it had found the preamble acceptable in substance, subject to further consideration of the first two paragraphs. It recalled that it had agreed to consider further whether to retain those paragraphs, delete them, or replace them with a single paragraph recalling the mandate of UNCITRAL (A/CN.9/794, para. 35).

19. It was suggested to delete the first two paragraphs of the preamble, on the basis that those paragraphs did not relate to the purpose and content of the convention, and that deleting them would promote clarity of interpretation. Another suggestion was made to retain the language in the second paragraph of the preamble that addressed the importance of the removal of legal obstacles to the flow of international trade and investment. In response, it was said that the language in the first two paragraphs of the preamble, including the language in relation to the removal of obstacles to the flow of international trade, did little to increase the interpretative value of the preamble.

20. After discussion, it was agreed to delete the first two paragraphs of the preamble as contained in paragraph 7 of document A/CN.9/WG.II/WP.181, in their entirety. With that modification, the Working Group approved the preamble in substance.

2. Draft article 1 — Scope of application

21. It was clarified in respect of article 1 that, in light of the agreement of the Working Group at its fifty-ninth session to provide for a general provision on scope and a separate provision on the obligations of the Contracting Parties as currently set out in article 3, the remaining issue for the second reading of the convention in relation to article 1 was whether the word "treaty" or the term "investment treaty"

ought to be used to refer to the investment treaties which are the subject of the convention.

"Investment treaty" or "treaty"

22. In support of the use of the words "investment treaty", it was said that in the context of a convention, it was preferable to use a specific term, rather than the more general word "treaty". In particular, it was said that the word "treaty" was already defined under the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention"), and that it could lead to confusion if that term was defined differently in the transparency convention. It was further said that the term "investment treaty" provided clear indication as to the type of treaty covered by the Convention.

23. In response, it was said that the term "treaty" was defined in the Rules on Transparency, and that using the same terminology in the Rules and the transparency convention would clarify that both instruments had the same scope of application in respect of the treaties to which they referred.

24. It was confirmed that the term "treaty" as defined in the Rules on Transparency, and "[investment] treaty" as defined in the transparency convention, indeed had the same meaning and that the slight discrepancy in the definitions (as contained in the footnote to article 1 of the Rules, and in article 1(2) of the transparency convention respectively) was a result of the intention to give guidance to users of the Rules, but to have a precise definition in the convention (A/CN.9/794, para.70).

25. A suggestion to move the definition contained in article 1(2) of the transparency convention to a footnote to article 1(1) did not receive support.

26. After discussion, it was agreed to (i) define the term in the transparency convention as "investment treaty", on the basis that the *travaux preparatoires* record that that was a purely terminological choice and that the definition of "investment treaty" in the convention, and the definition of "treaty" in the first footnote to the Rules on Transparency, had exactly the same meaning and scope; and (ii) amend paragraph (1) to read: "This Convention applies to investor-State arbitration conducted on the basis of an investment treaty." (see also below, para. 82).

3. Draft article 2 — Interpretation

27. The Working Group recalled that it had agreed to consider draft article 2 further, and in particular whether to retain or delete that article (A/CN.9/794, paras. 83-88).

28. After discussion, it was agreed to delete article 2, on the basis that that provision was not necessary and that moreover its content differed from Part III of the Vienna Convention, and consequently could lead to complexity in the interpretation of the transparency convention.

4. Draft article 3 — Application of the UNCITRAL Rules on Transparency

General

29. Two proposals were introduced in relation to article 3. The first was that the transparency convention apply on a reciprocal basis as between Contracting Parties to the convention, and specifically that in order for the Rules on Transparency to apply, both the respondent Party and the Party of the claimant would have to be Party to the convention and not have made a relevant reservation. The other was that a reservation by the Party of the claimant would not prevent the Rules on Transparency from being applied by a respondent Party which had not made a relevant reservation. Thus the former proposal provided that reservations should only apply under article 3(1)(a) where Contracting Parties to the convention had made the same reservation in respect of a relevant investment treaty, and the latter provided that a reservation, or lack thereof, formulated by the respondent Party would provide the applicable regime for any dispute.

30. By way of concrete example, those diverging proposals could be framed as a policy question, as follows: when Contracting Party A to the transparency convention had formulated a reservation in relation to a particular investment treaty, but Contracting Party B to the transparency convention had not, whether, when a claimant from Contracting Party A initiated a claim against Contracting Party B, the Rules on Transparency would apply to that dispute.

31. It was agreed that this was an issue of policy which ought to be considered before considering the precise wording of the respective proposals.

32. In addition, the Working Group considered whether, beyond any question of policy, there might be any legal impediments to applying the convention where there was no reciprocity with respect to the relevant reservation.

33. In relation to the policy question, it was said that requiring reciprocity under article 3 would mean that the transparency convention would apply in fewer situations, and consequently could also result in a less broad application of transparency. In response, it was said that that was not necessarily the case. It was recalled that the Working Group had considered at its fifty-ninth session what might happen should an underlying investment treaty contain a higher standard of transparency than the Rules on Transparency, and how that ought to be determined; it was agreed at that session that should a Party to the transparency convention wish to apply a higher standard in an underlying investment treaty, it could formulate a reservation to exclude that treaty from the application of the transparency convention. It was said that without including a requirement of reciprocity in relation to reservations and declarations, in those circumstances, the Rules on Transparency, and not the higher regime provided for in the underlying investment treaty, and agreed bilaterally, might be applied by the respondent Party.

34. In support of a reciprocal approach to reservations and declarations, it was said that when a Contracting Party formulated a reservation to the transparency convention, that reservation should apply not only to that Contracting Party but also to the investors of that Contracting Party, were they to initiate a dispute against a Contracting Party that had not made the same reservation.

35. Another view expressed in support of reciprocity of reservations was that a lack of reciprocity would run counter to Article 21(1) of the Vienna Convention and

as such was not desirable. In response, it was said that providing that a reservation would operate only in respect of the Contracting Party making the reservation but not in respect of a Contracting Party that had not made the same reservation did not run counter to Article 21(1) of the Vienna Convention, and that it would not be a legal bar to the transparency convention defining its own scope as one in which reservations need not be reciprocal.

36. A question was raised as to whether, in relation to investment treaties already in existence and hence to which the transparency convention would apply, higher standards of transparency than those contained in the Rules on Transparency did in fact exist. In response, various examples were cited, including of investment treaties that provided for fewer restrictions or constraints than the Rules on Transparency. However, another view was expressed that, particularly given the robust nature of the Rules on Transparency, the number of such treaties would pale in comparison to the number of investment treaties currently in existence and under which no transparency provisions, or lesser transparency provisions, applied. Furthermore, it was said that the examples given provided for modalities that did not necessarily justify a regime of reciprocity.

37. A question was raised as to whether reciprocity was necessary in relation to the different reservations provided for under article 5, and whether the policy issues discussed in relation to article 5(1)(a) would apply with the same force or at all in relation to article 5(1)(b), (c) and (2). Delegations supporting a reciprocal approach indicated that while the policy reasons would be less compelling under other provisions of article 5, clarity might require a consistent approach.

38. It was agreed to address the matter further at a later stage (see below, paras. 97-128).

Paragraph (2)

39. The Working Group approved the substance of paragraph (2) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 (see below, paras. 121 and 122).

Paragraph (3) — Most-favoured-nation clause

40. The Working Group recalled its consideration at its fifty-ninth session whether a most-favoured-nation clause ("MFN clause") in an investment treaty could be triggered by a carve-out of certain investment treaties from the transparency convention (A/CN.9/794, para. 118).

41. A view was expressed that paragraph (3), which provided that a claimant could neither avoid nor invoke the provisions of the transparency convention on the basis of an MFN clause, should be deleted, because (i) it was not clear whether, under existing jurisprudence, transparent arbitration would constitute more or less favourable treatment of an investor; (ii) MFN clauses in many investment treaties were framed sufficiently narrowly so as not to apply to the issues covered by the convention in any event; and (iii) including such a provision would not prevent MFN clauses from being invoked when the party attempting to invoke such a clause was from a State or a regional economic integration organization not party to the transparency convention.

42. It was also said in support of deleting paragraph (3) that, despite the clarification in the *travaux preparatoires* that the deliberations of the Working Group should not be interpreted as taking a position on the question of the applicability of MFN clauses to dispute settlement procedures under investment treaties (A/CN.9/794, para. 119), and that the Working Group was not expressing a position on how MFN clauses ought to be interpreted as a matter of international law, including a provision in relation to MFN clauses might give rise to a perception that the Working Group was in fact expressing such a position.

43. A different view was expressed that retaining a provision plainly could not give rise to any broader rule of interpretation, but would be useful in the context of the transparency convention to provide for greater certainty in addressing how an MFN clause should function in relation to investment treaties that were included in its scope. It was further said that from the perspective of an arbitral tribunal, it would be helpful if such a provision were included in the transparency convention in relation to the interpretation of an MFN clause in a particular investment treaty.

44. A proposal was made to replace paragraph (3) with the following language: "This Convention shall not create any obligation under an MFN clause in an investment treaty". That proposal did not receive support.

45. A separate proposal was made to clarify that paragraph (3) could be replaced with language more clearly indicating that the meaning of such provision was to create a procedural bar to claimants attempting to avoid or invoke the Rules on Transparency by way of an MFN clause, rather than a statement in respect of the interpretation of MFN clauses more generally.

46. After discussion, it was agreed that a provision reflecting the principle in paragraph (3) would be retained in the transparency convention, but that the drafting of that provision would need to be further considered (see below, paras. 88-96, 123 and 124).

Location

47. A proposal was made to relocate the provision to a separate article, in order that it would apply equally to article 4. It was said that that issue would be reconsidered further to the discussions of the Working Group on article 4.

5. Draft article 4 — Declaration on future [investment] treaties

48. It was noted that article 4 addressed the question of the application of the transparency convention to investment treaties concluded after 1 April 2014 (A/CN.9/794, paras. 53-58, 116-117).

49. A suggestion was made to delete that article on the basis that the main mandate given by the Commission (see above, para. 3) related to existing investment treaties. In addition, it was said that article 4 raised an issue of legal impossibility insofar as the provisions of an earlier investment treaty could not modify the provisions of an investment treaty concluded later in time, as article 4 purported to do (see A/CN.9/WG.II/WP.181, para. 30). In response, it was said that if two Contracting Parties agreed, after the conclusion of the relevant investment treaty, to apply the Rules on Transparency to that treaty via the transparency convention, the Rules on Transparency would so apply. It was said that while that

would be a narrower application of article 4 than that initially contemplated, it might still be worth retaining the article for that purpose. It was further said that such a mechanism could create a useful tool for those contracting Parties which may change their policy as regards increased transparency in the future.

50. After discussion, there was consensus that article 4 ought to be deleted and delegations that had requested to consult further on that matter were invited to revert to the Working Group at a later stage of its deliberations (see below, paras. 83-86).

6. Draft article 5 — Reservations

Paragraph (1)

51. The Working Group agreed to consider paragraph (1) alongside a consideration of article 3(1) at a later stage of its deliberations (see below, paras. 97-128).

Paragraph (2)

52. A proposal was made to replace paragraph (2) as follows: "2. In the event of amendment to the UNCITRAL Rules on Transparency, a Contracting Party may, within six months of the adoption of such amendment, make a reservation that such revised version of those Rules shall not apply under this Convention. 2(bis). In any arbitration in which the UNCITRAL Rules on Transparency apply pursuant to articles 3(1) or 4, the tribunal shall apply the most recent version of the Rules on Transparency as to which (a) in arbitrations falling under article 3(1)(a) or article 4(a), neither the respondent Contracting Party nor the Contracting Party of the claimant has made a reservation pursuant to article 5(2); and (b) in arbitrations falling under article 3(1)(b) or article 4(b), the respondent Contracting Party has not made a reservation pursuant to article 5(2) and as to which the claimant consents."

53. In support of that proposal, it was said that it clarified the version of the Rules of Transparency that ought to apply in the event there were successive revisions to the Rules on Transparency; namely, under that proposal, it was clear that the most recent version of the Rules to which both Contracting Parties had not formulated a reservation would apply, or in relation to a unilateral offer, the most recent version of the Rules agreed to by the respondent and to which the claimant had agreed.

54. After discussion, it was agreed to consider further the policy issue of whether to include a requirement for reciprocity under article 5(2). Further, it was agreed that in any event the structural nature of the proposal set out in paragraph 52 above should be retained as a useful basis for further drafting insofar as it clearly set out the effects of a reservation as to an amendment to the Rules on Transparency (see below, paras. 97-128).

Paragraph (3)

55. The Working Group approved the substance of paragraph (3) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 (see also below, paras. 114 and 128).

7. Draft article 6 — Declarations and reservations

Paragraph (1)

56. The Working Group approved the substance of paragraph (1) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

Paragraph (2)

57. The Working Group approved the substance of paragraph (2) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

Paragraph (3)

58. The Working Group approved the substance of paragraph (3) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

Paragraph (4)

59. A suggestion was made to insert the following language at the beginning of paragraph (4): "Except for reservations under article 5(2), which shall take effect immediately upon receipt by the depositary, a declaration, reservation, or modification of a declaration or reservation of which the depositary receives ...". It was said that reservations under article 5(2) ought to take effect immediately, so that an amendment to the Rules that a Contracting Party did not wish to implement would never apply to that Contracting Party.

60. A view was expressed that the application of reservations ought to be immediate. That view was not supported.

61. After discussion, it was agreed to adopt the proposal as set out in paragraph 59 above, but to remove the words "or modification of a declaration or reservation" contained therein, as repetitive with article 6(6). It was further agreed to add the words "for that Contracting Party" after the phrase "entry into force of the Convention". Consequently, the revised text of article 6(4) as agreed read as follows: "Except for reservations under article 5(2), which shall take effect immediately upon receipt by the depositary, a declaration or reservation of which the depositary receives formal notification after the entry into force of the convention for that Contracting Party takes effect on the first day of the month following the expiration of twelve months after the date of its receipt by the depositary."

Paragraph (5)

62. The Working Group approved the substance of paragraph (5) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

Paragraph (6)

63. A proposal was made to replace paragraph (6) as follows: "Notwithstanding paragraph 3, if, after this Convention has entered into force for a Contracting Party, that Party (a) makes a declaration under article 4; (b) withdraws or modifies a reservation made under article 5(1)(a) or (b) so as to apply article 3(1)(a) or (b) to arbitration under an additional investment treaty or under additional arbitral rules or

procedures; (c) withdraws a reservation made under article 5 (1)(c) or (2); or (d) withdraws or modifies a declaration made under article 9 so as to apply articles 3 or 4 to an additional territorial unit, or to arbitration under an additional investment treaty or additional arbitral rules or procedures; such declaration, withdrawal, or modification is to take effect on the first day of the month following the expiration of three months after the date of receipt of the notification by the depositary. Any other modification or withdrawal is to take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the depositary."

64. It was said in support of that proposal that it served to make mechanical the principle set out in article 6(6), as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 — namely, that there ought to be a shorter period of time for a withdrawal or modification that provided for greater transparency to take effect, and simultaneously a 12-month period for modifications or withdrawals that reduced transparency to take effect, as an anti-abuse measure.

65. In response, it was said that that proposal raised a practical concern as to whether the depositary function would be able to process such a variegated provision, even one that did not provide for a qualitative judgement to be made per se. The question was raised whether that proposal could adequately address a situation in which a withdrawal or modification both expanded the scope of transparency (e.g., by removing an investment treaty from a reservation under article 5(1)(a)), and contracted it (e.g., by at the same time formulating a reservation in respect of that treaty under article 5(1)(b)). It was said in response that that situation would not arise as the wording of article 5(1)(b) could not be applied on a treaty-by-treaty basis.

66. A view was expressed that in light of the practical difficulties raised by the text of the proposal set out in paragraph 63 above, and the possible burden it would impose on the depositary, a much simpler and more desirable option might be to have a single time period applicable to both types of modifications and withdrawals. It was said in support of that suggestion that simplicity and workability was advantageous, in particular given the direct implications of the convention on relevant arbitrations.

67. After discussion, a revised proposal was made as follows: "6. If, after this Convention has entered into force for a Contracting Party, that Party (a) withdraws or modifies a reservation made under article 5(1) so as to apply article 3(1) to arbitration under an additional investment treaty or to arbitration under additional arbitral rules or procedures; or (b) withdraws a reservation made under article 5(2); such withdrawal or modification is to take effect on the first day of the month following the expiration of three months after the date of receipt of the notification by the depositary. Any other reservation, modification, or withdrawal is to take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the depositary."

68. It was said that that proposal provided for greater simplicity, while retaining the principle of differentiated timing in relation to different types of withdrawals and modifications.

69. After discussion, the Working Group adopted the proposal set out in paragraph 67 above, subject to any drafting adjustments that might be required for

the purposes of ensuring consistency with other provisions in the convention (see below, paras. 134(a) and 136).

8. Draft article 7 — Depositary

70. The Working Group approved the substance of article 7, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

9. Draft article 8 — Signature, ratification, acceptance, approval, accession

71. The Working Group approved the substance of article 8, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 (for discussion on article 8(1), see below para. 137).

10. Draft article 9 — Effect in territorial units

72. A proposal was made to delete article 9 on the basis that such a provision only related to exceptional circumstances and moreover addressed matters beyond the scope of the transparency convention. It was said that States had developed their own practices with regard to the territorial application of treaties, and that such practice was more appropriately determined by national practice and public international law principles.

73. After discussion, the Working Group agreed to delete article 9.

11. Draft article 10 — Participation by regional economic integration organizations

74. The Working Group approved the substance of article 10, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181, subject to further consideration of whether article 10(1) should be deleted. The Working Group agreed to consider that drafting matter at a later stage of its deliberations (see below, paras. 129-133).

12. Draft article 11 — Entry into force

75. The Working Group approved the substance of article 11, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

13. Draft article 12 — Time of application

76. It was proposed to include in article 12 a reference to the withdrawal or modification of a declaration or reservation, on the basis that withdrawals or modifications should not affect arbitrations already commenced at the time of that withdrawal or modification. That proposal received support, and consequently it was agreed to amend article 12 such that it would read as follows: "This Convention and any declaration, reservation, or any modification to or withdrawal of a declaration or reservation, apply only to arbitrations that have been commenced after the date when the Convention, declaration, reservation, or any modification to or withdrawal of a declaration or reservation, enters into force or takes effect in respect of each relevant Contracting Party."

77. It was noted that the words "each relevant Contracting Party" at the end of that provision were intended to make it clear that the article referred to the time when the convention would enter into force in respect of the Contracting Party in

question, and not when the convention would enter into force generally (A/CN.9/784, para. 18).

14. Draft article 13 — Revision and amendment

78. A suggestion was made that the procedure in article 13 for revising or amending the convention should be further considered in order to ensure a comprehensive procedure for adopting amendments to the convention. The Working Group agreed to discuss that matter further (see below paras. 139-147).

15. Draft article 14 — Denunciation of this Convention

79. A suggestion was made that, for consistency with the wording used elsewhere in the text of the convention, paragraph (1) should provide that a denunciation "shall take effect" (instead of "takes effect"), and paragraph (2) should provide that the Convention "shall continue to apply" (instead of "will continue to apply"). It was also proposed to change the term "one year" to "twelve months" to maintain consistency with other provisions in the transparency convention.

80. The Working Group took note of the drafting suggestions and mandated the Secretariat to modify the drafting as necessary. In all other respects the Working Group approved the substance of article 14, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

B. Consideration of remaining open issues

81. The Working Group proceeded to address the remaining outstanding matters in its second reading of the transparency convention.

1. Article 1(2)

82. Further to its discussions on article 1 (see above, paras. 21-26), the Working Group agreed to retain the text of article 1(2) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 without amendment.

2. Article 4

83. Following its discussion on article 4 (see above, paras. 48-50), the Working Group considered that article further, and in particular, whether it ought to be deleted.

84. A proposal was made to retain article 4 but to replace it with the following language: "A Contracting Party may declare that the UNCITRAL Transparency Rules shall apply to any non-UNCITRAL arbitration proceedings commenced under an investment treaty concluded after 1 April 2014, to the same extent to which the UNCITRAL Transparency Rules are applicable under the UNCITRAL Arbitration Rules." It was said that that language would permit an application of the Rules on Transparency to arbitrations arising under future investment treaties that referred to arbitration rules other than the UNCITRAL Arbitration Rules. That proposal did not receive support.

85. It was furthermore said that the transparency convention was intended to address treaties existing prior to 1 April 2014, and that States or regional economic integration organizations concluding treaties after that date would be free to agree to apply the Rules on Transparency in conjunction with other arbitral rules or in ad hoc proceedings.

86. After discussion, it was agreed to delete article 4 in its entirety.

Effect of a renegotiation of existing treaties

87. Another question was raised in relation to whether, if Contracting Parties to the transparency convention also parties to an underlying existing investment treaty decided to reopen negotiations in relation to that existing investment treaty, in contravention of provisions of the transparency convention, that would amount to an amendment thereto, or have different consequences, in light of the later in time rule. Delegations were invited to reflect further on that question and to raise the issue again if it was felt that that question raised any concern which ought to be dealt with by appropriate wording in the convention.

3. Article 3, paragraph (3)

88. The Working Group recalled its decision to retain a provision regarding MFN clauses, subject to further consideration of the drafting (see above, para. 46).

89. The Working Group considered the following drafting proposal in that respect: "A claimant may not seek to alter the applicability or non-applicability of the Rules on Transparency under this Convention by invoking a most-favoured-nation clause."

90. Various drafting comments were made in relation to that proposal. It was suggested to simplify the provision as follows: "A claimant cannot invoke a most-favoured-nation clause to alter the application or non-application of the Rules on Transparency under this Convention."

91. In response to the concern that the provision would, under the proposals set out above, be addressed to claimants, not themselves party to the transparency convention, it was said that investment treaties themselves bestowed legal rights and obligations on nationals of Contracting Parties. A specific proposal to address that concern by adding the following opening words to the revised draft proposal contained in paragraph 89 above: "Each Contracting Party agrees that", received support.

92. It was said in relation to the proposal set out in paragraph 89 above, that the inclusion of the words "may not seek to alter" in fact served two important purposes in relation to how MFN clauses apply to procedural issues generally, and ought to be retained. First, it was said that those words ensured that the text avoided taking a position on the substance on possible application of the scope of MFN clauses in general; and second, if the words "cannot alter" were included instead, then it would suggest that the opposite would be true save for that provision.

93. Another suggestion was made to provide for a wider application of the provision in order to capture not only MFN clauses, but also other treaty provisions that disputing parties might use to alter the application of the Rules on Transparency, as well as the possibility that now or in the future, respondents could also invoke MFN clauses. That proposal read as follows: "The parties to the dispute

shall not seek to alter the application or non-application of the Rules on Transparency under the Convention by invoking the provision of the investment treaty". That proposal did not receive support.

94. After discussion, a modified proposal in relation to paragraph (3) was introduced as follows: "Each Contracting Party to this Convention agrees that a claimant may not invoke a most-favoured-nation provision to seek to alter the application or non-application of the Rules on Transparency under this Convention."

95. Views were expressed that that proposal did not reflect the possibility that investment treaty arbitration might develop such that respondents would also be able to invoke MFN clauses.

96. After discussion, it was agreed to adopt the modified proposal set out in paragraph 94 above, subject to a mandate to the Secretariat to adjust the drafting as necessary (see also below, paras. 123 and 124).

4. Articles 3 and 5

Reciprocity in relation to article 5(1)(a)

97. The Working Group considered further the matter of reciprocity of reservations as set out above in paragraphs 29 to 38. After discussion, and recalling the reasons set out in its discussions and recorded above at paragraphs 34 to 36, the Working Group agreed to adopt a requirement of reciprocity in relation to the reservations falling under article 5(1)(a).

98. It was said that in relation to article 5(1)(b), (c) and (2), taking into account the different policy considerations, there should be reciprocal application of such reservations. However, it was said that some of the underlying policy concerns in relation to article 5(1)(a), particularly in relation to investment treaties that articulated a higher degree of transparency (see above para. 33), did not apply in relation to the remainder of article 5. Another view was expressed that because those provisions did not raise the same policy concerns as the provisions of article 5(1)(a), they ought to be treated differently.

99. The Working Group proceeded to consider a concrete drafting proposal to implement the agreement for reciprocity under article 5(1)(a), and a possible reciprocal approach in the remainder of article 5, as follows. The proposal included article 3(1) in light of the linkage between those two articles: "Article 3. "1. Each Contracting Party to this Convention agrees that the UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules conducted pursuant to an investment treaty concluded before 1 April 2014, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1), and either (a) the claimant is of a Contracting Party that also has not made a relevant reservation under article 5(1), or (b) the claimant agrees to the application of the UNCITRAL Rules on Transparency." Article 5. "1. A Contracting Party may declare that: (a) a specific investment treaty, identified by title, name of Parties to that investment treaty, and date that investment treaty was concluded, shall not be subject to this Convention; (b) article 3(1)(a) and/or (b) shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules; (c) article 3(1)(b) will not apply."

100. It was suggested as a matter of drafting to relocate the phrase, in article 3(1), "conducted pursuant to an investment treaty", after the words "any investor-State arbitration". That proposal received support.

101. Another drafting proposal was made to remove the phrase "Each Contracting Party to this Convention agrees" from the beginning of article 3(1), to reduce repetition in that article. A separate proposal was made to move that phrase so that it would constitute a chapeau for the entire article.

102. A concern was raised that the phrase "relevant reservation" in paragraph (1) could lead to confusion or be misinterpreted, in light of the different types of reservations enumerated in article 5 and the applicability of those reservations to the obligations in article 3. By way of further explanation, it was said that by addressing reservations that applied to situations under article 3(1)(a) (reciprocal obligations) as well as under article 3(1)(b) (unilateral offers), article 5(1)(b) could lead to very complex determinations by an arbitral tribunal as to whether a reservation applied.

103. In response, a view was expressed that the phrase "relevant reservation" was clear, and that while it would require interpretation by the arbitral tribunal in respect of each dispute, a tribunal could be relied upon to determine whether a reservation applied in a particular case because it related to a particular treaty under which the arbitration was being conducted, a particular set of arbitration rules or a particular version of the Rules on Transparency. In support of that approach, it was said that retaining a simple draft was desirable.

104. Two proposals were made to address the concern set out in paragraph 102 above. The first proposal was to remove reference to reservations in article 3, but to ensure that article 5 clearly expressed the operative effect of a reservation.

105. The second proposal would: (i) replace the phrase in the last line of the chapeau of article 3(1), after the words "relevant reservation", with the phrase "under articles 5(1)(a) or (b), and either"; (ii) in article 3(1)(a), replace "5(1)" with "5(1)(a) or (b)"; and (iii) insert at the beginning of article 3(1)(b) the text "The respondent Contracting Party has not made a reservation under article 5(1)(c) and".

Reciprocity in relation to article 5(1)(b) and (2)

106. Following consideration of the second proposal set out in paragraph 105 above, the Working Group considered further the issue of whether article 5(1)(b), (c) and (2) ought to require reciprocity or whether the reservation of the respondent Contracting Party ought to be determinative in those instances.

107. In relation to article 5(1)(b), it was reiterated that there was no clear policy reason why reciprocity of reservations ought to exist as between Contracting Parties which had reserved from the application of the transparency convention certain sets of arbitration rules other than the UNCITRAL Arbitration Rules. It was also said that requiring reciprocity in that respect would add significantly to the complexity of determining whether the Rules on Transparency would apply in a specific instance.

108. A different view was expressed that a lack of reciprocity would contravene the provisions of the Vienna Convention (see above, para. 35), and that the transparency convention should not create a precedent in that respect. It was said that it was an established principle of public international law and treaty relations that a

reservation that was formulated should apply to modify obligations in a convention to the same extent for another Party in its relations with the reserving Party. It was also said that grouping reservations into different categories — reciprocity in relation to article 5(1)(a) and non-reciprocity in relation to article 5(1)(b) and (c) — might create an imbalanced regime that could deter States from joining the convention.

109. In response, it was said that the Vienna Convention did not provide any impediment to drafting a convention that expressed distinct legal outcomes. It was furthermore said by way of example, that it was standard to include non-reciprocal obligations in investment treaties.

110. In relation to article 5(1)(c), it was agreed that as that provision provided for the reservation from the option to make a unilateral offer to arbitrate on transparent terms, the only relevant reservation would in any event be that of the respondent Contracting Party.

Modified draft proposal for articles 3 and 5 ("modified draft proposal")

111. A suggestion was made to seek a compromise by defining the scope of application of the convention by reference to the reservations in article 5, in order to set out clearly when the Rules on Transparency would apply under the transparency convention.

112. Consequently a modified draft proposal was introduced in relation to articles 3 and 5, in their entirety.

113. Article 3 of the modified draft proposal read as follows: "1. The UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration conducted pursuant to an investment treaty concluded before 1 April 2014, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1)(a) or (b), and either (a) the claimant is of a Contracting Party that also has not made a relevant reservation under article 5(1)(a), or (b) the respondent Contracting Party has not made a reservation under article 5(1)(c) and the claimant agrees to the application of the UNCITRAL Rules on Transparency. 1bis. In any arbitration in which the UNCITRAL Rules on Transparency apply pursuant to article 3(1), the tribunal shall apply the most recent version of the Rules on Transparency as to which the respondent Contracting Party has not made a reservation pursuant to article 5(2). 2. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to arbitrations arising under investment treaties falling under paragraph 1(a). 3. Each Contracting Party to this Convention agrees that a claimant may not invoke an MFN provision to seek to alter the application or non-application of the Rules on Transparency under this Convention."

114. Article 5 of the modified draft proposal read as follows: "1. A Contracting Party may declare that: (a) a specific investment treaty, identified by title, name of Parties to that investment treaty, and date that investment treaty was concluded, shall not be subject to this Convention; (b) article 3(1) shall not apply to ad hoc arbitrations or arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules in which it is a respondent; (c) article 3(1)(b) will not apply. 2. In the event of amendment to the UNCITRAL

Rules on Transparency, a Contracting Party may, within six months of the adoption of such amendment, make a reservation with respect to that revised version of those Rules. 3. No reservations are permitted to this Convention other than as provided in this article."

115. Support was expressed for that text as set out in paragraphs 113 and 114 above, and after discussion, consensus was recorded that the modified draft proposal was acceptable in relation to articles 3 and 5, subject to any drafting modifications that may be proposed.

116. After discussion, various drafting proposals were made in relation to the modified draft proposal, including the following proposal in relation to article 3(1) ("the second modified proposal"): "1. The UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration conducted pursuant to an investment treaty concluded before 1 April 2014, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1)(a) or (b), and the claimant is of a Contracting Party that has not made a relevant reservation under article 5(1)(a). 2. The UNCITRAL Rules on Transparency, as they may be revised from time to time, shall also apply to any investor-State arbitration conducted pursuant to an investment treaty concluded before 1 April 2014, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1), (a), (b) or (c), and the claimant agrees to the application of the UNCITRAL Rules on Transparency."

117. It was said by way of further explanation that that second modified proposal separated the mechanism whereby both Contracting Parties had agreed to apply the transparency convention in respect of a particular investment treaty into paragraph (1), and a unilateral offer on the other hand, into a separate paragraph (2).

118. The second modified proposal received support.

119. A suggestion to make explicit the understanding that paragraph (2) required the State of the claimant not to be a party to the transparency convention, or to have formulated a relevant reservation, was not supported. However, it was suggested that by splitting article 3(1) into two paragraphs, the word "or", which had separated the subparagraphs (a) and (b) of article 3(1), and indicated that the second limb of that provision was only applicable if the first was not, no longer existed to clarify the disjunctive situation arising under those subparagraphs. Consequently a proposal was made to include at the beginning of paragraph (2) of that proposal the words "Where they do not apply pursuant to 3(1)", and to delete the word "also" in that paragraph.

120. After discussion, the proposal set out in paragraph 116 above, with the modification in paragraph 119 above, was accepted.

Application of article 1(7) of the Rules on Transparency

121. The Working Group had regard to the content of paragraph (2) as contained above in paragraph 113, which would become paragraph (3) under the second modified proposal. A question was raised as to whether that principle — the disapplication of the final sentence article 1(7) of the Rules on Transparency to

arbitrations under paragraph (1) of the second modified proposal, would also apply to paragraph (2). It was agreed that it would not, because paragraph (2) provided for a unilateral offer by a respondent Contracting Party to arbitrate transparently, and consequently the Rules on Transparency would apply by agreement of the disputing parties as contemplated by article 1(2)(a) of the Rules on Transparency so that article 1(7) of the Rules on Transparency would not come in the way of their application.

122. Consequently, it was agreed to retain the text of paragraph (2) of article 3, as set out above in paragraph 113.

MFN clauses

123. The Working Group had regard to the content of paragraph (3) as contained above in paragraph 113, which would become paragraph (4) under the second modified proposal. A concern was reiterated that framing that provision in terms of the claimant's inability to invoke an MFN clause said nothing about the possibility for a respondent or a third person to invoke an MFN clause (see also above para. 93). The Working Group agreed to retain the provision as contained in paragraph 113, on the basis that the only risk identified by the Working Group concerned the potential use of an MFN clause by claimants. It was reiterated that the Working Group could not, and did not purport to, make any statement or take any position as to the applicability or otherwise of MFN clauses to any given situation, but was merely providing for a procedural bar to prevent a claimant from invoking an MFN provision to seek to alter the application or non-application of the Rules on Transparency under this convention.

124. Consequently, it was agreed to retain the text of the modified draft proposal (as set out above in para. 113).

Article 5

125. The Working Group had regard to the content of article 5 as contained in the modified draft proposal (as set out above in para. 114).

126. Several proposed drafting changes were suggested in relation to that article. First, in relation to article 5(1)(b), it was suggested to adopt the language in paragraph 7 of document A/CN.9/WG.II/WP.181, such that that subparagraph would read as follows: "(b) article 3(1) shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules in which it is a respondent;". It was clarified that the word "certain" in that provision was intended to mean "all or some". It was also noted that, as article 3(1) had been split into two paragraphs, a consequential amendment was required in article 5(1)(b) to refer to both paragraphs (1) and (2) of article 3. Those suggestions were accepted, subject to any minor modifications to be made by the Secretariat for the purposes of drafting clarity.

127. Third, it was proposed to reintroduce the words "in arbitrations in which it is a respondent" to the end of article 5(1)(c). It was said that while that wording might not be strictly necessary, given the logical implication of a reservation in respect of a unilateral offer, such wording would promote clarity of drafting. After discussion, that modification was agreed.

128. Consequently the draft of article 5 as contained in the modified draft proposal was agreed, with the modifications set out in paragraphs 126 and 127 above.

5. Article 10(1)

129. Further to its previous discussions in relation to article 10 (see above, para. 74), the Working Group considered that if the word "State" were to be deleted from paragraph (1), and bearing in mind the drafting suggestion to delete the word "Contracting" where it appeared in the convention before the word "Parties" (see below, para. 135), article 10(1) would read: "Any reference to a 'Party' or 'Parties' in this Convention applies equally to a regional economic integration organization when the context so requires".

130. It was said that as "Parties" are defined as being both States and regional economic integration organizations in article 8(1), article 10(1) had become redundant and ought to be deleted. In addition, it was said that the words "when the context so requires", introduced an element of ambiguity throughout the draft.

131. A concern was raised that if article 10(1) were not to be deleted, the determination of the "context so requiring" in operational provisions of the convention such as in article 3, could lead to complexity. For example, when a State and a regional economic integration organization were both party to an investment treaty, it would not necessarily be clear whether a claimant from a "Party" could be from one or both of those entities under the transparency convention.

132. After discussion, a compromise proposal was suggested on the basis that the discussions appeared to relate to a single existing investment treaty to which a regional economic integration organization was a party — namely, the Energy Charter Treaty — and as such addressed a very limited and narrow set of circumstances. It was said that on that basis, a solution to replace in article 3(1), the words "a claimant is of a Party that has not made a relevant reservation" with the words "a claimant is of a State that is a Party that has not made a relevant reservation", and to delete article 10(1) as redundant, would be a solution.

133. That proposal received support. One delegation noted that although it would accept that proposal, it did so on the basis of achieving compromise and continued to have reservations about the substance of that solution. After discussion, that proposal was agreed, with the caveat that if after further examination it appeared that the text created difficulties in other circumstances outside the Energy Charter Treaty, that solution might need to be reconsidered.

C. Comments in relation to treaty practices

134. The Working Group took note of the following comments made by the Secretariat on the drafting of certain provisions of the transparency convention:

(a) Article 6(6): as a matter of simplification, the withdrawal of reservations under the first sentence of the revised proposal of article 6(6), as contained above in paragraph 67 could take effect immediately, instead of after a three-month period;

(b) Article 8(1): the words "that is a party to an investment treaty", as they appeared in article 8(1) should be deleted, as they were not necessary and would put

a burden of the depository to check whether a State or regional economic integration organization was indeed party to such investment treaty. With that modification, article 8(1) would read as follows: "This Convention is open until [date] for signature by (a) any State, or (b) a regional economic integration organization constituted by sovereign States.";

(c) The Working Group was further informed of the treaty practice to develop more detailed provisions on revision and amendment of conventions than that contained in article 13;

(d) As a matter of drafting, the Working Group agreed that the Secretariat should use the word "shall" in a consistent manner where appropriate in the text of the convention.

135. As a more general drafting matter, it was suggested to delete the word "Contracting" where it appears in the convention before the word "Parties"; it was further suggested to delete the words "on the first day of the month following the expiration of" where those words appear in articles 6, 11 and 14 of the convention. After discussion, those suggestions were agreed.

1. Article 6(6)

136. After discussion, it was agreed that withdrawal of reservations would take effect immediately following deposit, rather than after a three-month period.

2. Article 8(1)

137. The Working Group agreed to the deletion of the words "that is a party to an investment treaty" where it appeared in subparagraph (a) of article 8(1), and to retain those words where they appeared in subparagraph (b) of that article, for the reason that regional economic integration organizations ought to be party to such investment treaties to in turn become party to the transparency convention. In addition, the Working Group agreed that a provision should be included in the text of the convention providing that regional economic integration organization should declare, at the time of adoption of or accession to the convention that it is a party to an investment treaty.

3. Article 13

138. Following its discussion in relation to article 13 (see above, para. 78), the Working Group considered a proposal to redraft that article as follows: "1. Any Contracting Party may propose an amendment to the present Convention and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Contracting Parties to this Convention with a request that they indicate whether they favour a conference of Contracting Parties for the purpose of considering and voting upon the proposal. In the event that within [four] months from the date of such communication at least one third of the Contracting Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. 2. The conference of Contracting Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Contracting Parties present and voting at the

conference. 3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Contracting Parties for acceptance. 4. An adopted amendment enters into force six months after the date of deposit of the third instrument of acceptance. 5. When an amendment enters into force, it shall be binding on those Contracting Parties which have accepted it, other Contracting Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted. 5bis. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to an amendment, that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization, six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. 6. Any State or regional economic integration organization which becomes a Contracting Party to the Convention after the entry into force of the amendment shall be considered as a Contracting Party to the Convention as amended."

139. It was said that the purpose of that revised text was to provide a clear and detailed procedure in the event of amendment of the convention. It was explained that paragraph (1) was modelled after Article 47(1) of the Convention on the Rights of Persons with Disabilities and Article 44(1) of the International Convention for the Protection of All Persons from Enforced Disappearance. It was further explained that: (i) paragraph (1) aimed at clarifying that a proposal of an amendment is to be filed individually by each Contracting Party; and (ii) the second sentence of paragraph (1) was based on Article 40(2) of the Vienna Convention.

140. In relation to paragraph (2), it was said that it aimed at specifying the number of Contracting Parties necessary for the adoption of the amendment and that the proposed text emphasized consensus in accordance with the UNCITRAL practice. It was noted that paragraph (4) followed article 11(1) of the transparency convention and that paragraph (5) was based on Article 40(4) of the Vienna Convention. It was further noted that paragraph (6) corresponded to article 13(2) of the transparency convention, taking also into account Article 40(5) of the Vienna Convention.

141. After discussion, the Working Group agreed to consider the draft proposal as the basis of replacement for article 13.

142. In relation to the drafting of that proposal, it was agreed to replace: (i) the word "agreement" where it appeared in the second sentence of paragraph (2) of that proposal, by the word "consensus"; (ii) the word "acceptance" where it appeared in the draft proposal by the words "ratification, acceptance or approval"; and (iii) the word "accepted" where it appeared in paragraph (5) by the words "expressed consent to be bound by".

143. In relation to the substance of that proposal, it was suggested to delete the words "other Contracting Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted" in paragraph (5), on the basis that that matter was dealt with under the Vienna Convention in a more nuanced fashion. That proposal was agreed.

144. A further suggestion was made to delete paragraph (6) of that proposal; that suggestion did not receive support. A separate proposal to provide under paragraph (6) that Parties acceding to the convention after an amendment thereto should be given the option to adopt the convention with or without the amendment, was also not supported.

145. A proposal to revise the title of article 13, to read simply "Amendment", in order better to reflect the substance of the provision, was accepted.

146. After discussion, it was agreed to retain the text of the proposal set out in paragraph 138 above, as modified by paragraphs 142, 143 and 145 above.

V. Organization of future work

147. In relation to future work in the field of dispute settlement to be considered by the Commission at its forty-seventh session, the Working Group reiterated its understanding that it would commence work on the revision of the Notes on Organizing Arbitral Proceedings at its sixty-first session.

VI. Other business

148. In commemoration of the sixtieth session of the Working Group, and having regard to the significance of the work of that Working Group since its inception, Bryan Hymel, the American operatic tenor, sang the aria "*Ah! Lève-toi Soleil*" from the opera "*Roméo et Juliette*" by Charles-François Gounod.

United Nations A/CN.9/800

General Assembly

Distr.: General
28 February 2014

Original: English

United Nations Commission on International Trade Law
Forty-seventh session
New York, 7-25 July 2014

Report of Working Group I (MSMEs) on the work of its twenty-second session (New York, 10-14 February 2014)

Contents

		Paragraphs	Page
I.	Introduction	1-3	2
II.	Organization of the session	4-10	2
III.	Deliberations and decisions	11	4
IV.	Preparation of legal standards in respect of micro, small and medium-sized enterprises (Simplification of business incorporation and registration)	12-65	4
	A. Micro, small and medium-sized enterprises in the global context	12-18	4
	B. Features of simplified and other business incorporation regimes and their impact on MSMEs	19-27	5
	C. Issues relevant to commencing the work	28-64	8
	D. Next steps	65	16
V.	Possible future work	66	17

V.14-01288 (E) 050314 060314

Please recycle

I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.[1] At that session, the Commission took note of the broad consensus among the participants at the second UNCITRAL colloquium on microfinance organized in Vienna in January 2013, that such a working group should be established.

2. At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should initially focus on legal questions surrounding the simplification of business incorporation and registration. It was further agreed that other topics to be considered in the context of MSMEs at a later date included: (a) a system for resolving disputes between borrowers and lenders; (b) effective access to financial services; (c) guidance on ensuring access to credit; and (d) insolvency.[2]

3. As noted in the materials before the Commission and during its deliberations at its forty-sixth session, in 2013, in addition to reducing barriers to MSMEs entering the formal economy and thus, inter alia, helping them to maximize their economic potential, work on the simplification of business incorporation and registration could have additional salutary international effects. In particular, it was noted that an internationally recognized form of business registration could be expected to facilitate cross-border trade for MSMEs operating in regional markets, since it would provide a recognizable international basis for transactions and avoid problems that may arise because of a lack of recognition of the business form of the enterprise.[3]

II. Organization of the session

4. Working Group I, which was composed of all States members of the Commission, held its twenty-second session in New York from 10-14 February 2014. The session was attended by representatives of the following States Members of the Working Group: Armenia, Australia, Brazil, Canada, China, Colombia, Denmark, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Nigeria, Pakistan, Panama, Paraguay, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Uganda and United States of America.

5. The session was attended by observers from the following States: Chile, Dominican Republic, Finland, Guatemala, Libya, Madagascar, Poland, Romania, Serbia, Uruguay and Viet Nam.

---

[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[2] For a history of the evolution of the topic of MSMEs on the UNCITRAL agenda, see A/CN.9/WG.I/WP.80, paras. 5-12.

[3] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 316-319; Note by the UNCITRAL Secretariat, Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, A/CN.9/780, para. 10.

6. The session was attended by the following non-member States having received a standing invitation to participate as observer in the sessions and the work of the General Assembly: Holy See.

7. The session was also attended by observers from the following international organizations:

(a) Organizations of the United Nations system: World Bank;

(b) Invited intergovernmental organizations: International Cotton Advisory Committee, League of Arab States, Organization of American States and World Customs Organization;

(c) Invited international non-governmental organizations: American Bar Association (ABA), Centro de Estudios de Derecho Economía y Politica (CEDEP), Commercial Finance Association (CFA), Fondation pour le Droit Continental, National Law Center for Inter-American Free Trade (NLCIFT), New York State Bar Association (NYSBA) and The Association of the Bar of the City of New York (ABCNY).

8. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Mr. Francisco Reyes (Colombia)

9. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.80);

(b) A note by the Secretariat concerning selected activities of international and intergovernmental organizations to promote MSMEs (A/CN.9/WG.I/WP.81);

(c) A note by the Secretariat on the features of simplified business incorporation regimes found in selected States, as well as empirical information concerning their use (A/CN.9/WG.I/WP.82); and

(d) Observations by the Government of Colombia concerning the Colombian Simplified Corporation (A/CN.9/WG.I/WP.83).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legal standards in respect of micro, small and medium-sized enterprises (Simplification of business incorporation and registration).
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on the simplification of business incorporation and registration regimes, on the basis of Secretariat documents A/CN.9/WG.I/WP.81 and A/CN.9/WG.I/WP.82, and of the observations of the Government of Colombia in A/CN.9/WG.I/WP.83. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises (Simplification of business incorporation and registration)

A. Micro, small and medium-sized enterprises in the global context

12. The Secretariat highlighted certain aspects of document A/CN.9/WG.I/WP.81, which provided a non-exhaustive survey of initiatives of intergovernmental, regional and international organizations in support of MSMEs. UNCITRAL's proposed work on MSMEs could be placed in the broader context of the United Nations work on sustainable development and inclusive finance, including the preparation of the Post-2015 Development Agenda. Furthermore, as considered during the 2013 UNCITRAL colloquium on microfinance and as noted at the forty-sixth session of the Commission (in 2013) such work could contribute to reinforcing the rule of law at the country level.

13. Reference was made to United Nations General Assembly resolution 67/202, which focused on the contribution of entrepreneurship to sustainable development, calling for the creation of an enabling environment for entrepreneurs, including MSMEs, by addressing legal, social and regulatory barriers. In addition, United Nations work to promote cooperatives was noted, in particular in respect of the 2012 International Year of Cooperatives, which stressed the contribution of cooperatives to economic development and poverty eradication and highlighted that they could represent an enterprise model in those areas where the public sector was not able to meet the needs of the population.

14. As noted in A/CN.9/WG.I/WP.81, regional organizations and regional economic organizations supported MSMEs in various ways. However, policy development and the provision of technical assistance seemed to prevail over the drafting of comprehensive legislation addressing the needs and requirements of MSMEs. Among the various organizations reviewed by the Secretariat, only the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) appeared to be working towards such a legislative framework.

15. Similarly, initiatives and projects of international organizations did not seem to focus on assisting the development of new legislative models that would facilitate the establishment and operation of MSMEs in the formal economy. Attention focused mainly on reducing the existing regulatory, economic and administrative

barriers that represented a constraint on MSMEs in order to promote their formalization in the medium and long term.

16. In addition to the examples of MSME support included in document A/CN.9/WG.I/WP.81, the World Customs Organization (WCO) advised the Working Group of its Model Business Law Checklist for SMEs. The model was being developed with a view to assisting Member States in designing, modifying and reviewing customs policies and procedures from the perspective of SMEs. The WCO also informed the Working Group that a research book regarding informal trade would be issued.

17. As A/CN.9/WG.I/WP.81 concluded, the development of an internationally recognized and harmonized approach to creating the legislative infrastructure to foster the development of MSMEs had not yet been fully explored. While individual States had experienced notable success in developing such regimes domestically, little had been done in terms of establishing a means of internationalizing that success. Therefore, the mandate entrusted by the Commission to Working Group I, starting with simplified business registration and incorporation and extending to additional issues, appeared to be a natural complement to existing work being carried out globally and regionally to assist the development and growth of MSMEs.

18. The Working Group expressed its agreement with the conclusions of A/CN.9/WG.I/WP.81. It was observed that the topic of simplified incorporation had a cross-border as well as a domestic dimension, since it could provide MSMEs a recognizable international basis for transactions. For this reason, the topic was said to be relevant for both developing and developed countries and could be expected to enable MSMEs to unleash their full potential.

B. Features of simplified and other business incorporation regimes and their impact on MSMEs

19. The Working Group was also reminded of the main issues raised in document A/CN.9/WG.I/WP.82 in its consideration of features of simplified and other business incorporation regimes and how those features could be relevant to support MSMEs. It was noted that simplified corporate forms were a relatively new type of regime aimed at providing a more flexible and accessible business form for MSMEs, which could also be advantageous for enterprises of a larger size. It was observed that many different types of enterprises could benefit in several ways from the creation of simplified corporate forms, including smaller closely-held companies, family firms, joint ventures and professional service firms.

20. The comparison of different simplified corporate forms contained in document A/CN.9/WG.I/WP.82 was highlighted, noting that the different regimes were examined in respect of three main areas. First, issues of limited liability and other aspects of formation were considered, including legal personality, issues relating to disclosure of financial statements, formation requirements, and the number of founders required pursuant to each legal regime examined. The second main area of comparison focused on internal governance established in each of the legislative schemes, in particular on internal governance itself, on financial rights among owners, on the existence of freedom of contract in establishing the internal governance and on the transferability of the ownership interest. Finally, each

separate regime was also examined with a view to the fiduciary duties they required in order to protect the enterprise from abusive or excessively negligent behaviour on the part of managers.

21. Other aspects of document A/CN.9/WG.I/WP.82 were highlighted, such as the suggestion that concerns about the potential of simplified business forms for their abuse in pursuit of criminal activities could be addressed through disclosure of beneficial ownership and sharing of information domestically and internationally. In addition, possible methods of conflict resolution for participants in simplified business forms were noted, including through derivative actions or the existence of exit rules for enterprise owners to withdraw or be expelled from the business. Another approach considered for conflict resolution was the creation of specialized business courts and procedures focused on providing faster, more flexible and expert dispute resolution for participants in simplified corporate forms. Finally, the attention of the Working Group was drawn to various available statistics indicating the success of such simplified business forms in a number of different States.

General comments on the direction the work could take

22. Several general observations were made in respect of issues that could be considered by the Working Group in addressing its mandate. The view was expressed that the work, once completed, should include a list of best practices drawn from country experience in this area. In addition, it was observed that SMEs and larger enterprises were more likely to require consideration of international issues than micro-sized enterprises, which were more likely to operate in a more limited scope and thus be subject to the specific context of individual States. Other views were expressed that, although ambitious, the Working Group should consider the possible internationalization of small and micro-sized businesses, particularly in the modern electronic business era, and in respect of craftsmen and others who may add value in the production chain. The Working Group also noted that its work should be undertaken with a view to enhancing the creditworthiness of MSMEs. Finally, two intergovernmental organizations advised the Working Group of their strong interest in, and support of, the work being undertaken.

Size of the enterprise and application to specific sectors

23. Some States shared their experience in terms of simplified business forms, some of which were the result of ongoing legislative reforms, whether such efforts were intended specifically to support MSMEs, or for other reasons. In one instance, it was noted that the focus of a State's legislative reform was not based on the size of the business, but on providing appropriate measures for businesses to formalize with minimal capital requirements. Later in the life cycle of such businesses, when they became more successful, they could transition to full limited liability corporations. Other examples were given of the creation of certain categories of companies based on size and the types of business undertaken, but noting that the traditional approach to corporation law had not relied on different sizes of enterprises. In addition, it was observed that some simplified regimes have focused directly on assisting MSMEs, while others were applied to smaller enterprises only after the regimes had been developed for other purposes, yet the net result of both approaches had been positive for MSMEs and larger enterprises. States also observed that, in general, their business incorporation regime did not focus on

specific sectors of the economy. Presentations were made by two delegations evidencing that simplified business registration and incorporation had a substantial impact on increasing the registration and incorporation of micro and small businesses in their countries.

24. In general, it was agreed that although a definition of MSMEs was used in certain contexts, including in providing policy support through mechanisms such as subsidies and taxation relief, it was not necessary to approach the simplification of business incorporation with specific company size in mind. The main concern in terms of size of enterprises intended for inclusion in a simplified incorporation regime was to ensure that sole proprietors were considered for inclusion in the regime, even those that might be engaged in relatively simple business activities. It was also observed that some States offered a fairly extensive menu of different legal options to enterprises wishing to formalize, while others appeared to offer fewer alternatives, but enhanced flexibility, to entrepreneurs.

Limited liability

25. It was observed that, while limited liability was broadly available and considered to be an important incentive to include in a simplified incorporation regime, some States considered it useful to restrict limited liability to corporations possessing certain features that balanced the enterprise's obligations to stakeholders such as employees, contracting parties, investors or banks. Support was expressed to include mechanisms, such as piercing the corporate veil, to address situations where limited liability might be abused. In addition to limited liability corporations, the Working Group was encouraged to consider inciuding a regime for cooperatives in its discussions on simplified business forms, particularly given the importance of cooperatives in several States.

Online registration, single point of entry and standard articles of incorporation

26. Several States noted that online registration of businesses was quite broadly available, and that many States have dramatically reduced the time necessary for incorporation of a business through the use of electronic means. In States that require notarial services for valid business incorporation, special online conduits have been established between notaries and the relevant authorities to speed the process. A single point of entry for enterprises wishing to formalize has been established in several States; in addition, templates containing standard articles of incorporation are offered in many States to smaller businesses and those with reduced business sophistication.

Intergovernmental and cross-border collaboration and information-sharing

27. It was observed that the sharing of information on the beneficial ownership of enterprises was one method of dealing with the potential misuse of simplified business regimes for illicit purposes. Several States reported requirements for the sharing of such information stemming from either domestic legislation or international commitments. In addition, it was noted that European Union (EU) Directive 2012/17/EU (13 June 2012) required the interconnection of central, commercial and companies registers within the EU; while the information-sharing platform would allow public access, it would not be fully operational for several years.

C. Issues relevant to commencing the work

Limited liability and legal personality

28. Further to the discussion on limited liability in paragraph 25 above, the Working Group continued to explore the issue of limited liability, particularly as it related to legal personality. Limited liability was described as an important risk-reducing system that allowed entrepreneurs to take business risks without fear of failure, but it was noted that many MSMEs were currently excluded from such a protective regime and that efforts should be made to include them. There was general support for the view that limited liability and legal personality offered to MSMEs important advantages in doing business and that it was important to provide access to these advantages to such enterprises.

29. However, it was also noted that some legal regimes linked limited liability to capital requirements, while still providing for partnerships without minimum capital requirements but with no limited liability. Another legal regime allowed streamlined limited liability models for micro-business without reference to legal personality. One example was provided where an entrepreneur possessed no legal personality but could nevertheless protect certain assets from seizure by creditors. Another example was provided of a legal regime in which legal personality had become less relevant and that businesses with no legal personality could still be involved in legal actions and own property. Some interest was expressed in exploring these options as possible solutions.

30. Several delegations emphasized the importance of focusing on the nature of MSMEs and the business environment in which they must operate in order to appropriately assist them. It was noted that enterprises doing business in many legal systems were faced with a range of options from limited companies with capital requirements to limited partnerships to cnterprises with no legal personality or limited liability. It was noted that it may not be possible to find one solution for all types of enterprises, and it was suggested that the Working Group may wish to focus on different frameworks for different types of enterprises.

31. It was indicated that exceptions to limited liability varied among jurisdictions. However, it was further suggested that it was not necessary at this stage of the discussion to establish a common understanding of the principles of legal personality or limited liability.

A single model with a great deal of flexibility

32. The question was raised in the Working Group whether it would be desirable to focus in its work on a single legislative model, ensuring that it was flexible enough to cover many different types of business.

33. There was some support for the view that a single model with built-in flexibility could be appropriately adapted to all forms of MSMEs. However, it was suggested that having a single flexible model could be both complicated for micro and small businesses and a source of extra cost. Alternatively, it was suggested that it could be possible to create a continuum of different business forms (sole proprietor, partnership and limited liability company) that would accommodate

different types of entrepreneurs based on their needs and circumstances. There was some support for that view.

Model law, legislative guide or another form

34. The Working Group next considered what form its work on the preparation of legal standards in respect of MSMEs and simplified business incorporation and registration should take. It was noted that UNCITRAL texts represented a fairly broad range of types of instruments, but that the forms most suitable for the work at hand could be a legislative guide or a model law, possibly with a guide to enactment, or some combination thereof.

35. It was observed that efforts had previously been undertaken in a regional economic integration organization to create a single private limited liability company form for the region, but that such efforts had proven difficult. That experience suggested that achieving consensus on a model law could be difficult and that the preferred approach could be to prepare a legislative guide to help policymakers in States prepare regimes suitable for their local needs. An additional suggestion made reference to the same experience, but instead suggested that the Working Group should not focus on simplified incorporation, but rather on the registration of companies and the use of unique identification mechanisms to provide greater transparency and broader, more efficient sharing of information.

36. A preference was also expressed by some delegations for the preparation of a legislative guide over a model law for the reason that model laws might not be widely taken up by States, and since they were said to lack the flexibility that a legislative guide could offer through its commentary and recommendations. This flexibility was said to be particularly important in order to allow States using the legislative guide to adapt the legal approach to the local context and in a manner appropriate for the needs of MSMEs. In addition, it was noted that legislative guides were not static texts, but rather they could be organic and be added to with additional chapters when necessary.

37. A preference was also expressed by other delegations for the preparation of a model law, particularly in light of the fact that there was already an existing example (as provided in A/CN.9/WG.I/WP.83) that had proven effective and could be an appropriate starting point for discussions. It was noted that a model law need not necessarily be a rigid instrument that presented only one approach to a particular issue, but that different options could be accommodated within a single model law, and that this approach would be preferable to preparing a range of model laws from which it might be difficult to choose. It was also observed that, while legislative guides were very useful and contained an enormous amount of information, including best practices, it could be difficult for certain States to effectively use that information to prepare appropriate legislation. The preferred option in these cases could be to offer States a model law that contained the main legislative components and could be easily modified for specific use by States. It was noted that one drawback of adapting model laws to local circumstances was that it would reduce the harmonizing effect of the model law, but that at least the starting point for an adapted model law would have been a single international standard.

38. It was further suggested that the Working Group could prepare both a model law and a legislative guide in order to maximize the information provided and the

flexibility of the materials, but also to provide relatively simple solutions for States wishing to consider an existing legislative scheme rather than preparing one on the basis of information provided in a legislative guide. The Working Group agreed to take its decision on the form of the text to be prepared after it had further considered the issues that would be included in the text, as well as what the text should achieve. However, there was support for the suggestion that the Working Group should consider preparing model articles of incorporation, particularly if they were to be paired with a model law, since such texts could be very helpful for MSMEs.

Use of a possible hybrid business form approach

39. The question was raised to what extent the Working Group wished to build upon hybrid business forms in order to achieve positive results in terms of simplifying business incorporation and registration to assist MSMEs. It was observed that it might not be necessary to adopt a hybrid business form in order to accommodate these needs, and that the experience of some States indicated that other business forms could be accommodated by adapting existing company law rather than creating a specific hybrid form. However, there was support for the view that hybrid business forms could prove useful even in legal systems where less flexible approaches to business forms were usually taken. It was further stated that hybrid business forms could offer an opportunity for States to move beyond existing business forms that may not adequately support MSMEs in order to create different forms that accomplished that goal.

40. In further explanation of an existing hybrid business form, it was noted that the legal regime was based upon rules from both the common law and continental law traditions, incorporating favourable aspects of both partnership and company law. Freedom of contract in the system described was very broad, and the internal governance system was very flexible, accommodating simple one-person forms as well as more complex structures. In response to the view expressed that less flexible business forms satisfied stakeholders in the market and protected third parties and creditors, it was noted that hybrid business forms were also able to provide adequate protection for creditors and third parties dealing with the enterprise.

Transparency in respect of beneficial ownership

41. The Working Group also considered the issue of ensuring transparency in respect of beneficial ownership of closely-held corporations. The question was raised whether this issue intended to focus on protecting creditors and other stakeholders dealing with the corporation, or whether the intention was to prevent money-laundering, terrorist activity and other illicit activities involving these types of corporations. It was suggested that the issue should be considered from both perspectives, noting that substantial work in the latter area had been done by the Financial Action Task Force and the G8 (see also paragraphs 26 to 30 of A/CN.9/WG.I/WP.82). It was suggested that these issues were of a regulatory nature, but that the Working Group should remain mindful of them in its work. It was further noted that carefully constructed legal requirements for incorporation in some States could also serve the purpose of providing transparency in such circumstances.

Possible alternative approaches for micro-businesses

42. Further to the discussion on possible legislative models aimed at the simplification of incorporation for MSMEs in paragraphs 34 to 38 above, the Working Group considered in greater detail possible topics that could be included in such models. Issues raised for the consideration of the Working Group included matters such as incorporation procedures, contents of the formation document of the entity, registration of the business and proof of its existence. Concern was expressed that, while appropriate for the creation of a simplified incorporation regime for small and medium-sized business, several of these issues were possibly too burdensome to meet the needs of micro-entrepreneurs wishing to formalize their businesses. There was support for the view that micro-businesses required a model that was less complex and more specifically designed to meet its needs. It was said that the greatest needs of micro-entrepreneurs were the ability to set up their business quickly and easily, and to be able to access credit to grow their businesses. Similarly, it was noted that in many States, micro-businesses tended to be sole owners and it was questioned whether it was appropriate to expect a micro-business to seek to be incorporated under such detailed rules, particularly when resorting to them would require some education and business sophistication. It was felt that requiring micro-businesses to incorporate, even in a simplified fashion, could work against bringing such businesses into the formal market. There was support in the Working Group for these views.

43. Suggestions were made that the Working Group could approach its mandate by treating separately the categories of small entrepreneurs and micro-entrepreneurs. It was said that this could accommodate the different needs of these two groups, while still providing each with the possibility of joining the formal economy and of starting a business with limited assets. Consistent with the mandate of the Working Group, the treatment of micro-entrepreneurs could focus on simplified registration, at least as a first step.

44. However, it was suggested that imposing a rigid distinction between micro and small business would not assist in the creation of an enabling legal environment for MSMEs, which should allow for business growth in a progressive cycle, from micro to small and medium. Furthermore, even micro-businesses, including those that are sole proprietors, would need basic formalities in order to establish themselves.

45. In order to maintain a uniform approach by the Working Group to the creation of a legislative model to simplify incorporation for micro and small entrepreneurs, an alternative approach was suggested focusing on issues common to both these types of businesses. These issues included limited liability, legal personality, the protection of third parties and creditors dealing with the enterprise, registration of the business, sole ownership and internal governance issues. Freedom of contract was suggested as an additional topic, since in some countries, entrepreneurs had limited flexibility in the way they could establish and conduct their businesses.

46. Reference was made to several national legislative models applicable to micro and small businesses that might be considered relevant by the Working Group in its further consideration of how best to approach its mandate. For example, it was possible in some States for entrepreneurs to segregate property in certain circumstances, despite not possessing true legal personality. Relevant delegations agreed to submit to the next session of the Working Group documents presenting the

distinctive features of those models with a view to facilitating the understanding of the Working Group in respect of how such features could provide alternative forms of organization for micro and small businesses.

Business registration

47. In keeping with its discussion in paragraphs 42 to 46 above, the Working Group was of the view that emphasis should be given in its work to the importance of business registration. It was noted that business registration was key as it was required of enterprises of all sizes wishing to formalize, and that there was no need to treat registration of micro-businesses differently, provided that registration of enterprises could be accomplished quickly and at a low cost. It was also observed that business registration was not a goal unto itself, but that it was intended to provide transparency and a means to establish recognition for a business to enter into a formal environment. While this information would be shared among the relevant authorities for the purposes of taxation and other regulatory measures, it was noted that registration would also assist micro-businesses to obtain financing and access to government assistance programmes such as subsidies and reduced-cost services. However, it was also observed that registration would not necessarily be available to or desirable for all micro-businesses and single person entrepreneurs and that the Working Group should continue to consider additional measures that could help these businesses to formalize.

48. One delegation related its successful experience with recent and significant changes to its business registration system, which other delegations referred to as the most sophisticated in the region. The system was modernized to permit both electronic and manual registration, and procedures were greatly simplified as well as being provided quickly and at no cost. Another delegation described its more formal model of business registration, which was accomplished through a notary who carefully verified the information, which could then be relied upon to provide transparency for all third parties in their dealings with the business. Moreover, despite its formal nature, business registration could be accomplished in a few days.

49. The Working Group agreed to request the Secretariat to prepare a document for its next session in which best practices in respect of business registration would be examined for further discussion by the Working Group. The following issues were highlighted as being relevant to that future consideration:

(a) Identification of the minimum information necessary to register;

(b) Establishment of a unique identification number for businesses, which would not conflict with global initiatives in this regard;

(c) Data protection and confidentiality;

(d) Ability to search for a unique business name;

(e) Easily-updated information;

(f) Identification of who would have access to the information, including credit institutions and the public;

(g) Consider interconnectivity among relevant authorities, including that information need only be provided once by the user;

(h) Low or no cost;

(i) Quickly accomplished;

(j) Minimal and simple procedures to follow;

(k) A record of the history of the business should be maintained;

(l) A standard model form should be provided electronically to the user and could possibly be used for the creation of company by-laws;

(m) Provide the user with the necessary means to conduct business, such as providing a tax identification number; and

(n) Provide proof of existence of the business.

50. In addition, in respect of anti-money-laundering, anti-terrorism and the prevention of other illicit activity, it was agreed that other international guidelines and recommendations should be taken into account.

Capital requirements for incorporation

51. It was observed that the requirement of minimum capital for incorporation was an issue on which there was not agreement in all quarters. Although it was acknowledged that too high a capital requirement could be considered too harsh, the view was reiterated that minimum capital requirements were necessary and reasonable in order to offset the provision of limited liability to an enterprise and to signal its commitment to the sustainability of the business. It was further noted that even in States where incorporation with no capital requirement was possible, an enterprise nonetheless required assets in order to function. Another view questioned the need for limited liability, observing that a business owner in that State would obtain access to credit most easily by agreeing to unlimited personal liability.

52. However, there was support in the Working Group for the opposite view that the requirement of minimum capitalization of an enterprise was not an appropriate method of protecting third parties dealing with the business, and could both increase costs and unnecessarily keep businesses out of the formal economy. Other means that did not impose significant costs on businesses were suggested as better able to protect creditors, such as the creation of standards of conduct including good faith, transparency of business information, fiduciary responsibilities and the ability to pierce the corporate veil. One particular problem related to establishing minimum capital requirements was said to be the difficulty of quantifying an appropriate amount, and the rigidity inherent in making such a choice. There was broad agreement with the view that the modern trend was to move away from minimum capital requirements. One delegation quoted World Bank research indicating that minimum capital requirements hindered business development and growth, as well as failing to fulfil the regulatory functions for which they were intended.

53. It was observed that in keeping with the modern trend away from strict minimum capital requirements for incorporation, certain legal regimes had been established that took into account the difficulty of smaller enterprises to meet those requirements early in their life cycle, and had adopted a system of progressive capital requirements. Several States reported having as one of their incorporation models a system whereby an enterprise could incorporate with no or a nominal capital requirement, but that each year it operated, the company was required to set

aside a certain percentage of its profit, or a set amount each year, until its reserves reached a certain amount such that it could be said to be, or to amount to, a fully capitalized corporation. Another State reported a variation on the progressive capitalization approach, which adopted a limited liability partnership model that used a similar transitional phase to allow the business to grow over the course of several years until it reached a minimum reserve level, during which time there were restrictions on the distribution of dividends and sharing of profits. Reasons for creating additional flexibility in terms of minimum capital requirements included the fact that in deciding whether to deal with the company, creditors were more likely to focus on the assets of the company than its liabilities, and that forum-shopping was taking place by companies wishing to operate in a State, but not wishing to incorporate in that State and meet its minimum capital requirements.

54. A concern was raised that even progressive capital requirements could negatively impact small enterprises starting up, since the first three years of their life cycle were the most critical, yet the enterprises would be required to progressively build up their reserves during that period in spite of their possible financial fragility. It was reiterated that the Working Group should continue to be mindful of the fact that different sizes of businesses, from micro to small to medium, could require different solutions in terms of the issue of minimum capital requirements.

55. Additional possible alternatives to a minimum or progressive capitalization requirement to protect third parties dealing with such enterprises were also suggested. For example, accounting rules that require certain transparency could be used, as could specific rules relating to the distribution of the profits of the company. Another solution used by a State was to require no minimum capital, but to require public disclosure, possibly by way of a registry, by the business of any decision it took in respect of its capital, including setting aside certain amounts or having variable capital reserves. In addition, it was said that the issue of transparency in accounting and the auditing of financial statements could assist in the protection of third parties, as could the establishment of credit bureaus, be they established by the State or by private interests. Other elements that could be used to protect third parties were said to be the establishment of a supervisory role by company registries; the establishment of specialized agencies to supervise businesses; monitoring corporate governance; setting interest rates; and ensuring that secured transactions and insolvency laws permitted negotiated contractual protections.

56. It was noted that a State with progressive capitalization requirements for one of its types of incorporation provided notice to third parties by requiring such corporations to use a specific suffix in its legal name. Another possible method of protecting third parties that was under consideration by a State was to allow a corporation to have limited liability without capitalization requirements, provided that it was limited to a maximum turnover — an approach that would again differentiate on the basis of the size of the business.

57. Other methods of protecting third parties dealing with companies with minimum or no capitalization was linked to the issues outlined in paragraph 52 above, and were said to have been especially effective in developing States. Rather than establishing ex ante requirements which could impose costs on companies, the State could instead intervene ex post in order to discipline fraudulent behaviour or

irregular use of the company. In addition, it was observed that certain ex ante requirements could also be effective in preventing such behaviour from occurring, and that insolvency procedures could also be invoked to assist third parties.

58. The Working Group was reminded that the size of the informal economy in States that were members of the Organization for Economic Cooperation and Development was quite modest in comparison to figures available on the size of the informal economy in developing countries. It was said that bringing actors in the informal economy into the formalized system was therefore mainly a problem in developing countries, and it was suggested that providing a scheme for simplified business incorporation presented one option for enterprises wishing to make the transition into the formalized economy.

59. It was further observed that the Working Group may wish to take note that not all third parties dealing with the enterprise could be protected in the same way. It was noted that high standards of public disclosure in terms of an enterprise's finances might be sufficient to protect voluntary creditors of a company, but that such mechanisms may not sufficiently protect involuntary creditors, nor may minimum capital requirements or obligatory capital reserves. It was suggested that in such cases, States may wish to establish better mechanisms for satisfying the claims of involuntary creditors so as to avoid putting an unnecessary burden on the business.

Dispute resolution

60. It was noted that issues in respect of dispute resolution did not only concern the resolution of disputes among partners or as between partners and managers of the business, but related also to conflicts arising between the business and third parties, such as creditors or clients. In the case of the former, it was noted that conflicts involving business partners and managers were often resolved in courts, which could be problematic in developing States due to a lack of experience in dealing with such matters, expensive court fees and overburdened court dockets. One method of dealing successfully with this problem in both developing and developed countries had been to establish special courts to deal with such disputes.

61. In respect of disputes involving the business and third parties, several delegations highlighted the need for micro and small businesses to have access to fast and inexpensive dispute resolution mechanisms rather than dealing with the formal court system. Experiences were shared by various delegations as to their approach in resolving disputes concerning micro and small businesses and in providing consumer protection. Several examples concerned the establishment of specialized institutions for the resolution of disputes resulting from financial claims. In one case, it was observed that the institution could not render binding decisions, but relied on voluntary compliance by the financial intermediary at fault; cases of non-compliance were publicized, resulting in a strong negative effect on the commercial reputation of the party at fault.

62. It was also suggested that there was a need to address conflict arising between MSMEs and third parties in situations of financial distress of the business. This was said to require a simplified regime of insolvency that would meet the needs of MSMEs, a matter currently being considered in UNCITRAL's Working Group V. One State provided an example of an expedited regime that it had for micro and

small business, aimed mainly at encouraging refinancing arrangements. The Working Group agreed on the importance of providing simplified and low-cost dispute resolution procedures to MSMEs, with a particular focus on methods such as arbitration and mediation, including online dispute resolution.

Governance issues

63. The Working Group next considered the issue of the internal governance of enterprises. It was generally agreed that freedom of contract should be the guiding principle in terms of establishing the internal organization of a company, although it was noted that very unsophisticated micro and small businesses could find resort to this principal a challenge in setting up their businesses. Two examples of possible exceptions to absolute freedom of contract in this regard were said to be rules regarding the prevention of conflicts of interest of managers of the company and certain rules relating to the law of agency. It was noted that freedom of contract was a desirable goal, but that micro and small businesses might have difficulty with the transaction costs of establishing their own internal governance and of complying with it, and that standard forms could also be useful in this regard.

64. It was also noted that some forms of business association were quite rigid and required certain information in the articles of association from which there could be no deviation. It was said that such rules were necessary for very practical reasons, for example, to establish how revenues of the company should be distributed. Moreover, very strict rules were also required for some publicly-traded companies in order to prevent instability that could damage the economic system.

D. Next steps

65. The Working Group agreed that it had been able to consider a number of important issues key to developing its work on preparing legal standards on simplified business incorporation and registration, and considered what work would have to be accomplished prior to its next session in order to make progress in fulfilling its mandate. In addition to the document setting out best practices in respect of business registration which the Secretariat had been requested to prepare for the next session of the Working Group (see paragraph 49 above), a second document was to be prepared in advance of that session by States outlining their experience in respect of alternative approaches to the challenges of simplified incorporation and supporting MSMEs (see paragraph 46 above). In addition to those materials, the Secretariat was requested to prepare a template on simplified incorporation and registration containing contextual elements and experiences linked to the mandate of the Working Group, to provide the basis for drafting a possible model law, without discarding the possibility of the Working Group drafting different legal instruments, particularly, but not exclusively, as they applied to MSMEs in developing countries. This template could include provisions on limited liability, legal personality, registration and proof of existence of companies, incorporation procedures, capital requirements or alternatives thereto, accounting and transparency, and liability of those who represent the company.

V. Possible future work

66. The Working Group acknowledged and welcomed the Commission's mandate relative to the establishment of an enabling legal environment to facilitate the life cycle of MSMEs, beginning with the implementation of simplified rules of registration, incorporation and operation of such enterprises, in addition to other topics such as financial inclusion, including mobile payments, access to credit, alternative dispute resolution and simplified insolvency rules.